Order

Michigan Supreme Court
Lansing, Michigan

May 27, 2022

Bridget M. McCormack,
Chief Justice

163415

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163415
COA: 352303
Oakland CC: 2019-270167-FC

EUGENE JAMES BEARDEN,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 17, 2021 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., (*concurring*).

I concur in the order denying leave to appeal because I agree the unnecessarily suggestive identification in this case was nonetheless reliable under *Neil v Biggers*, 409 US 188 (1972). However, I write separately to note that this is yet another instance of police conducting a showup without any apparent reason.

Aline Barker and Dylan Williams negotiated to buy an SUV from a man calling himself "Geno Beatden" on Facebook. After agreeing to a price of $1,700, Barker and Williams went to a house where they were greeted by a man they recognized from the Facebook profile picture. Barker and Williams went inside where there were also two other men. Barker and Williams spoke with the seller for about 20 minutes before he left the room, and the two other men came in wearing masks and carrying guns. The gunmen demanded Barker and Williams turn over their belongings, and they turned over about $1,700 in cash, a cell phone, a cell phone charger, a tablet, and a debit card from H & R Block.

Barker and Williams were allowed to leave, and they flagged down a passing motorist. Barker and Williams told the motorist what had happened and where they had been robbed. The motorist told them he knew the man who lived in the house—Eugene Bearden. They called the police, who were also familiar with Bearden.

The police came to Bearden's house, which was actually next door to where the robbery had taken place. Bearden answered the door and let the police come inside and search. The police found two other men, Argina Colman and Derrion Spivey; a cell phone charger; a tablet; a debit card from H & R Block; and $1,662 in cash. The police then arrested Bearden and took him outside where he was identified by the complainants.

Defendant argues that the identification was unnecessarily suggestive and that the trial court erred by denying his motion to suppress the complainants' identification of him at trial. "Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *People v Sammons*, 505 Mich 31, 41 (2020). The parties and the Court of Appeals agree the identification was suggestive. As this Court has said, "all we need to observe in order to conclude that the procedure was suggestive is that defendant was shown singly to the witness." *Id*. at 44. Such was the case here.

I agree with the Court of Appeals panel that this suggestive procedure was unnecessary. Although this Court has not had the occasion to draw clear boundaries regarding necessity, the panel's analysis does an excellent job of connecting the existing dots in the caselaw:

> In the instant matter, the police located defendant and Spivey in defendant's home approximately 20 to 30 minutes after the robbery occurred. Additionally, Barker and Williams identified defendant and Spivey approximately 30 minutes after the robbery occurred. Although a prompt identification procedure would allow the police to determine whether defendant and Spivey committed the robbery or whether the actual gunmen were still at large, the showup identification procedure was not necessary. Before arriving at defendant's home, Oakland County Sherriff's [sic] Sergeant Todd Hunt had heard over the police radio that defendant was involved in the robbery. Defendant allowed the police to search his home, and the police found several items in defendant's living room that had been taken from Barker and Williams. Given this set of facts, the police had good reason to believe that defendant and Spivey were involved in the robbery such that it was unlikely that there were other armed individuals at large nearby. Unlike the example provided in *Sammons*, there was no indication that Barker and Williams were unable or unwilling to identify the individuals involved in the robbery at a later time. Accordingly, it was not necessary for the police to utilize a suggestive identification procedure in this instance. [*People v Bearden*, unpublished per curiam opinion of the Court of Appeals, issued June 17, 2021 (Docket No. 352303), p 3.]

I also agree that under our existing caselaw this identification was reliable. The factors to consider in this regard are "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Sammons*, 505 Mich at 50-51 (citation and quotation marks omitted). The third factor is debatable. Barker and Williams said the SUV seller was wearing a multicolored bandana, and Bearden was also wearing a multicolored bandana. However, Barker and Williams described the bandana as having a motorcycle on it, and Bearden's did not. Even if this factor weighed against reliability, the other four factors weigh in favor of reliability. I agree that the trial court properly denied the motion to suppress under the standard currently provided by our caselaw.

However, as the Court noted in *Sammons*, the constitutional floor set by the United States Supreme Court on this point rests on the prediction that "[t]he police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable." *Manson v Brathwaite*, 432 US 98, 112 (1977). That prediction proved to be inaccurate in *Sammons*, where the police conducted a showup as a matter of course. That prediction proved to be inaccurate in *People v Johnson*, 506 Mich 969 (2020) (CAVANAGH, J., concurring), where the police conducted a showup as a matter of course. That prediction proved to be inaccurate in *People v Moore*, ___ Mich ___; 970 NW2d 316 (2022) (CAVANAGH, J., dissenting), where police conducted a showup as a matter of course. Once again, the police appear not to have been correctly incentivized to not use an unnecessarily suggestive identification procedure. As I have noted, "[o]ther jurisdictions have charted different courses than the constitutional floor set by *Manson*." *Moore*, ___ Mich at ___; 970 NW2d at 319. See also *Sammons*, 505 Mich at 50 n 13. Once again, we have not been asked to reach that question in this case.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.